

ESTATE OF ELLA DAUTOBI

IBIA 86-37

Decided February 18, 1987

Appeal from an order denying petition for rehearing issued by Administrative Law Judge Sam E. Taylor in Indian Probate IP OK 58 P 84, IP OK 122 P 83.

Affirmed.

1. Indian Probate: Appeal: Timely Filing

Under regulations promulgated by the Board of Indian Appeals in January 1981, the effective date for filing a notice of appeal is the date of mailing or of personal delivery.

2. Indian Probate: Evidence: Generally--Indian Probate: Wills: Self-proved Wills

An affidavit to accompany Indian will executed in accordance with 43 CFR 4.233(a) constitutes prima facie evidence of due execution of the will, and places the burden of proving the will was not duly executed on the will contestants.

3. Indian Probate: Wills: Publication

Publication is not a prerequisite for valid execution of a will conveying Indian trust or restricted property.

4. Indian Probate: Evidence: Conflicting Testimony--Indian Probate: Witnesses: Observation by Administrative Law Judge

Where evidence is conflicting, the Board of Indian Appeals normally will not disturb a decision based upon findings of credibility when the Administrative Law Judge had an opportunity to hear the witnesses and to observe their demeanor.

5. Indian Probate: Wills: Testamentary Capacity: Generally

The burden of proving lack of testamentary capacity in Indian probate proceedings is on those contesting the will.

6. Indian Probate: Wills: Testamentary Capacity: Generally

The mere recitation of a medical term is not sufficient to prove lack of testamentary capacity in an Indian probate proceeding.

7. Indian Probate: Evidence: Newly Discovered Evidence--Indian Probate: Rehearing: Generally

Standing alone, the initial failure to discover evidence and witnesses before the conclusion of the original hearing in an Indian probate proceeding does not justify presentation of that evidence in a rehearing as newly discovered.

8. Indian Probate: Wills: Insane Delusions

An insane delusion is not merely an erroneous belief, but a belief so unreasonable that it defies rational explanation or justification.

9. Indian Probate: Appeal: Matters Considered on Appeal

The Board of Indian Appeals is not required to consider arguments and evidence raised for the first time on appeal.

APPEARANCES: F. Browning Pipestem, Esq., Norman, Oklahoma, for appellants; Robert L. Johnston, Esq., Oklahoma City, Oklahoma, for appellee.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE LYNN

On May 12, 1986, the Board of Indian Appeals (Board) received a notice of appeal from Harry Domebo, James Domebo, Dorothy Domebo Barr, Marie Dautobi Ostrowski, Rebecca Guajardo Rocha, Ethel Kay Domebo Anderson, and Patrick Lee Domebo (appellants). Appellants sought review of a March 7, 1986, order denying petition for rehearing issued in the estate of Ella Dautobi (decedent) by Administrative Law Judge Sam E. Taylor. Denial of rehearing let stand a September 19, 1983, order determining decedent's heirs and approving her will, under which her entire estate passed to her daughter, Juanita Guajardo Cortez (appellee). For the reasons discussed below, the Board affirms that order.

Background

Decedent, Kiowa Allottee 1770, was born January 23, 1896, and died January 26, 1983, at the age of 87. A hearing to probate her Indian trust

estate was held before Judge Taylor on May 25, 1983. The hearing was continued until June 29, 1983, in order to obtain the testimony of the second witness to a document executed on February 23, 1967, and alleged to be decedent's last will and testament.

Evidence presented at the hearing showed that decedent had been married twice. Her first marriage, to Andy Domebo, ended with her husband's death on August 23, 1924. Four children were born of this marriage: Harry Domebo, Joseph Domebo, James Domebo, and Dorothy Domebo Barr. Joseph Domebo predeceased his mother, leaving several surviving children. Marie Dautobi Ostrowski was born to decedent between her marriages. Decedent's second marriage was to Richard Guajardo, and ended in divorce in 1974. Two children were born of this marriage: Rebecca Guajardo Rocha and Juanita Guajardo Cortez.

Other evidence presented showed that decedent was diagnosed in 1966 as having a condition termed "senile psychosis." ^{1/} She was hospitalized and received treatment for this condition, among others, before and after the execution of the 1967 will.

The will scrivener and witness, Lyle Griffis, was a former Departmental Field Solicitor in Anadarko, Oklahoma. Refreshing his memory with a memorandum he had written immediately after the execution of the will, ^{2/} Griffis testified about the unusual circumstances surrounding the execution of decedent's will. Griffis stated decedent's sister had initially called him, asking him to come to decedent's home to prepare a will. When he discovered decedent could come to the office, Griffis requested she come there. According to Griffis, decedent was accompanied by Lilly Kodaseet, who was to witness the will, and several family members, including appellee and the sister who had initially contacted him. Griffis said family members continually interrupted the proceedings by coming into the room and attempting to participate in the preparation of the will. When his requests that they leave and wait outside were unheeded, Griffis testified he finally resorted to locking the office door. Although he stated Kodaseet told him it was difficult to communicate with decedent in English and offered to interpret into Kiowa, Griffis said he had no trouble communicating with decedent, except that he had to speak loudly because she was hard of hearing. He further stated Kodaseet was present the entire time and made several statements to decedent in Kiowa, a language he did not understand. Griffis noted decedent appeared very quiet during the preparation and execution of the will.

Kodaseet was not present at the May hearing. When she testified at the continued hearing in June, she stated the will was already prepared when she arrived and she did not even know she was witnessing a will.

^{1/} Decedent was also diagnosed as suffering from pernicious anemia, chronic pyelonephritis, and duodenal ulcer.

^{2/} Griffis testified it was his normal practice to prepare such a memorandum after the execution of each will because he prepared so many wills while he was with the Solicitor's Office that his recollection of the circumstances of the execution of a particular will dimmed with the passage of time.

As to the dispositive provisions of the will, Griffis said when he realized the bulk of decedent's estate was to go to only one of her children, appellee here, he questioned her more fully about her intent to assure himself that this disposition reflected her own desires. He was convinced it did because she stated she was living with appellee, who was the only one of her children who cared anything about her welfare. Under Clause 2 of the will, decedent devised Andy Domebo's original allotment equally to Harry, Joseph, and James Domebo, Dorothy Domebo Barr, and Marie Dautobi Ostrowski. Clauses 3 and 4 of the will specifically disinherited Rebecca Guajardo Rocha and Richard Guajardo. The remainder of decedent's estate was devised to appellee.

Based on the evidence presented, Judge Taylor approved decedent's February 1967 will in an order dated September 19, 1983. However, he found Clause 2 of the will void because decedent had disposed of the property there devised during her lifetime.

Appellants sought rehearing of this order on the grounds that due execution of the will and testamentary capacity had not been shown by the testimony of the two will witnesses. Furthermore, appellants alleged they had newly discovered evidence in the form of the testimony of a friend of decedent and an attending physician, relating to decedent's mental condition.

On July 10, 1984, Judge Taylor held a third hearing in this estate. The purpose of this hearing was two-fold: (1) to obtain further testimony concerning the execution of the will, and (2) to permit the introduction of evidence to assist in the determination of whether or not rehearing should be granted. Over objections from both counsel as to the admissibility of particular evidence and testimony, further information was presented on the issues of will execution and testamentary capacity, including the meaning, progression, treatment, and prognosis of the condition termed "senile psychosis."

By order dated March 7, 1986, Judge Taylor denied rehearing, finding that the evidence presented at the third hearing supported the initial order approving decedent's will. Appellants' appeal from this order was received by the Board on May 12, 1986. Both appellants and appellee filed extensive briefs on appeal. ^{3/}

^{3/} Appellants filed an opening brief on July 24, 1986, and an "amended opening brief" on Aug. 26, 1986, the time at which appellee's answer brief was due. See 43 CFR 4.311 and Board order of May 20, 1986. The opening brief was itself filed after two extensions of time. Appellants did not request prior permission from the Board to file an untimely, additional brief. See 43 CFR 4.311(b). Appellants' amended opening brief is considered in this case only because appellee did not object to its filing. For cases in which the Board has stricken untimely briefs, see, e.g., Estate of Jessie McGaa Craven, 1 IBIA 157 (1971); Estate of Mary Ursula Rock Wellknown, 1 IBIA 83, 78 I.D. 179 (1971), dismissed, Shaw v. Morton, Civil No. 974 (D. Mont. July 6, 1973).

Motion to Dismiss

Appellee has moved to dismiss this appeal on the grounds that the notice of appeal was not timely filed. Citing prior Board cases, appellee contends that the date a notice of appeal is received is the controlling date. Because appellants' notice of appeal was received more than 60 days after the issuance of the decision being appealed, appellee argues the appeal should be dismissed.

[1] The cases cited by appellee all predate a January 1981 revision of the Board's regulations. See 46 FR 7336 (Jan. 23, 1981). Under the present 43 CFR 4.310(a), "[t]he effective date for filing a notice of appeal * * * is the date of mailing or the date of personal delivery." Appellants' notice of appeal was timely mailed within the 60-day time period established in 43 CFR 4.320(a). 4/ Accordingly, appellee's motion to dismiss is denied.

Contentions of the Parties

The arguments raised on appeal are not easily separated. In broad summary, appellants argue Judge Taylor was biased against them and impermissibly used the third hearing for purposes not requested in the rehearing petition, the will proponents failed to make a prima facie showing of due execution of the will, the will was not published to both witnesses as is required by 43 CFR 4.233(a), decedent lacked testamentary capacity because of senile psychosis, Judge Taylor misperceived the nature of senile psychosis, newly discovered evidence relating to decedent's mental condition required a rehearing, decedent was suffering from an insane delusion when the will was executed, appellee exerted undue influence on decedent, and appellee was in a confidential relationship with decedent.

Appellee contends Judge Taylor merely exercised his discretion concerning the way in which the hearing should be conducted, the alleged newly discovered evidence was cumulative of evidence presented at the original hearings, the will contestants failed to prove lack of testamentary capacity or undue influence, and the will was properly executed. Appellee does not respond to appellants' confidential relationship argument because that argument was raised for the first time in appellants' reply brief.

Discussion and Conclusions

Appellants apparently base their assertion that judge Taylor was biased against them on two circumstances. First, in response to their petition for rehearing, the Judge acknowledged that several pertinent questions concerning the execution of the will were not asked at the initial hearing. He attributed this failure to the fact that both he and the parties were concerned with exploring the unusual details surrounding the execution of this will and neglected to ask some of the routine questions.

Second, the first part of the July 1984 hearing was devoted to asking the questions that had been omitted in the earlier hearings. The Judge asked

4/ Section 4.320(a) was itself amended, effective June 18, 1986, subsequent to the notice of appeal in this case. See 51 FR 18326 (May 19, 1986).

most of the questions during this portion of the hearing. Apparently based on this fact, appellants argue the Judge became the proponent of the will.

Based upon a thorough review of the transcript, it is apparent Judge Taylor asked the relevant questions in an attempt to ensure that necessary answers were obtained in an orderly and expeditious manner. The witness was not coached as to "proper" responses, but was at all times free to answer truthfully. At one point when counsel for appellants objected to the way in which Judge Taylor asked a question, the question was rephrased, even though the question merely summarized what the witness had stated during the initial hearing. The witness further responded to extensive cross-examination by counsel for appellants. The Board finds nothing in the transcript or the decision to substantiate appellants' contention that Judge Taylor was biased against them.

[2] Appellants next argue the will proponents failed to make a prima facie showing that the will was validly executed. The will at issue here is a "self-proved" will, executed in accordance with the provisions of 43 CFR 4.233(a). Section 4.233(a) states in pertinent part:

A will executed as provided in § 4.260 may, at the time of its execution, be made self-proved, and testimony of the witnesses in the probate thereof may be made unnecessary by the affidavits of the testator and attesting witnesses, made before an officer authorized to administer oaths, such affidavits to be attached to such will and to be in form and contents substantially as follows:

* * * * *

* * * If uncontested, a self-proved will may be approved and distribution ordered thereunder with or without the testimony of any attesting witness.

Proper affidavits were attached to the will and signed by the testatrix, witnesses, and scrivener. In summary the affidavits state the two attesting witnesses heard decedent publish the document as her will, signed the document as witnesses at decedent's request and in the presence of decedent and each other, and saw the will either read to or by decedent. In Estate of William Cecil Robedeaux, 1 IBIA 106, 118, 78 I.D. 234, 240 (1971), dismissed, Robedeaux v. Morton, No. 71-646 (W.D. Okla. Jan. 11, 1973), the Board specifically held that "[s]uch an affidavit in and of itself constitutes prima facie evidence" of due execution. The Board then held the will contestants bore the burden of proving the will was not properly executed.

[3] Appellants' only challenge specifically addressed to will execution is that decedent did not publish the will to both witnesses. This challenge is based on the testimony of Lilly Kodaseet to the effect that decedent did not declare the document to be her will. Initially, the Board notes publication is not a prerequisite for valid execution of a will conveying Indian trust or restricted property. See, e.g., 43 CFR 4.260(a); Estate of Carrie Standing Haddon Miller, 10 IBIA 128 (1982); Robedeaux, supra.

[4] The testimony of Kodaseet conflicted with that of Griffis, the will scrivener and second attesting witness. Judge Taylor specifically addressed this conflict in his March 7, 1986, order denying rehearing at pages 1-2:

Mr. Griffis, the scrivener and witness, testifying from notes he dictated immediately after the event, testified that he, Lilly Kodaseet and testatrix were all together when the will was discussed and executed. Therefore, he and Lilly Kodaseet knew that the document was decedent's will. Lilly Kodaseet, testifying from her memory of an event which took place 16 years previous, one to which she could not deny being a part of, but one in which her participation was now placing her in the middle of a controversy between children of her friend, the testatrix, admitted that she was present and that the scrivener did read the document to the decedent in her presence and that she did sign it. Accordingly, it is evident she knew it was decedent's will she was witnessing.

It is clear Judge Taylor considered the conflicting testimony of the two attesting witnesses concerning the execution of the will and found Griffis' testimony to be more credible and reliable. ^{5/} The Board will not disturb a Judge's finding of witness credibility unless the finding is clearly against the weight of the evidence. Estate of Joseph Kicking Woman, 15 IBIA 83 (1987). Judge Taylor's finding is not clearly against the weight of the evidence.

[5] Several of appellants' remaining arguments concern decedent's testamentary capacity in light of the fact that she had been diagnosed as having "senile psychosis." The burden of proof as to testamentary incapacity in Indian probate proceedings is on those contesting the will. Tsoodle, *supra*; Estate of Asmakt Yumpquitat (Millie Sampson), 8 IBIA 1 (1980). Appellants argue, primarily through testimony offered on rehearing as newly discovered, that decedent's mental condition was such that she could not comprehend either the meaning of her actions or the natural objects of her bounty. Appellants contend in essence that decedent was out of touch with reality as evidenced by her statement that she was living with one person when she was actually living with another, and calling a natural daughter, adopted. All of these problems are attributed to decedent's "senile psychosis." Appellants further contend Judge Taylor misperceived the nature of "senile psychosis" when he found there could be periods of remission from the severest manifestations of the condition.

[6] At the original hearings in the estate, appellants, as the will contestants, merely introduced evidence that decedent was diagnosed as having "senile psychosis." No attempt was made to show the nature of this condition or to identify the extent to which decedent suffered from it through expert

^{5/} On the weight to be given a contemporaneous record of impressions prepared by a will scrivener, see Estate of Samuel Tsoodle, 11 IBIA 163, 167 (1983).

medical testimony or the testimony of decedent's friends or relatives who were with her at the time. The mere recitation of a medical term is not sufficient to prove testamentary incapacity.

[7] Appellants attempted to overcome the inadequacy of their initial presentation by arguing they should be allowed to introduce medical and lay testimony on rehearing as "newly discovered" evidence. They present no sufficient reason for the failure to locate their newly discovered witnesses prior to the close of the continued hearing. The initial failure to look for and discover evidence and witnesses does not justify presentation of that evidence in a rehearing. Estate of Alice Mae Sasse, 12 IBIA 281 (1984); Estate of Andrew Jackson, 12 IBIA 39 (1983). Judge Taylor properly declined to grant rehearing on the basis of this evidence. 6/

[8] Appellants next argue decedent was suffering from an insane delusion when she executed her will; i.e., that she was living with appellee when she was actually living with Marie. The Board examined the meaning of "insane delusion" in Estate of William Mason Cultee, 9 IBIA 43 (1981), aff'd, Cultee v. United States, No. 81-1164 (W.D. Wash. Sept. 14, 1982), aff'd, 713 F.2d 1455 (9th Cir. 1983), cert. denied, 466 U.S. 950 (1984). The Board quoted from the decision in Attocknie v. Udall, 261 F. Supp. 876, 882 (W.D. Okla. 1966), 7/ which had in turn quoted from the decision of the Departmental hearing examiner:

[A]n insane delusion is not merely an erroneous belief. The belief must not only be wrong, it must be unreasonable. It must defy rational explanation or justification. Stated another way an insane delusion must be such that only a person with a deranged or abnormal mind would believe that the "insane delusion" represented the truth or was correct.

Or, as stated by Administrative Law Judge Robert C. Snashall in the decision on review in Cultee, an insane delusion must be "so contrary to reason that none but a person of an unsound mind can entertain it." Quoted in Cultee, 9 IBIA at 46.

In the present case, no attempt was made to question decedent on her statement regarding her living circumstances. Her statement was made in a credible fashion and the will scrivener had no reason to doubt it. Although it is undisputed that decedent had been living with Marie before she executed

6/ The Board has repeatedly held that when Indian parties are not represented by counsel, the Administrative Law Judge has a duty to ensure that the interests of the unrepresented party are fully developed during the hearing. See, e.g., Estate of Charles Webster Hills, 13 IBIA 188, 92 I.D. 304 (1985), and cases cited therein. This responsibility does not arise when all parties are represented by counsel.

7/ Aff'd, 390 F.2d 636 (10th Cir. 1968), cert. denied, 393 U.S. 833 (1968). This case was subsequently ordered dismissed on the grounds that no appeal from the administrative determination was permitted.

her will, it would be the worst form of speculation to attribute her statement to an insane delusion. 8/ The Board declines to engage in such speculation.

Finally, appellants argue appellee and decedent were in a confidential relationship and, therefore, the burden should have been on the will proponent to show that undue influence was not exerted upon decedent in the preparation of her will. Hills, supra. This argument was raised for the first time in appellants' reply brief before the Board. At pages 14-15 of that brief, appellants state:

This case is replete with circumstances that indicate a confidential relationship existed. In order to establish the existence of a confidential relationship, the Board has traditionally looked to the circumstances surrounding the will.

Relevant factors the Board has considered in finding a confidential relationship include:

- (1) evidence that the beneficiary accompanied the decedent to the attorney's office when the will was discussed and executed and;
- (2) that such person was the primary beneficiary of the will and;
- (3) evidence that the decedent needed an interpreter,
- (4) evidence that the decedent entrusted financial matters to the primary beneficiary.

Appellants continue on page 17:

As a consequence of the insane delusion Mrs. Dautobi truly did believe that [appellee] provided her with a good home, that [appellee] cared for her every need, and the other children neglected her and cared nothing for her. These factors alone, although totally unfounded and the product of an insane delusion, are sufficient to raise the question of a confidential relationship. The decedent's misplaced trust in [appellee] stemmed from the decedent's ill-founded disease-induced belief that a confidential relationship existed between her and [appellee]. [Appellee] capitalized on this confidential relationship in order to procure the will for her own benefit.

Appellants ask the Board to exercise the inherent authority of the Secretary to correct the alleged manifest error under which they were given the burden of attacking the will. 43 CFR 4.320. In fact, what appellants really seek

8/ This is particularly true when the record shows decedent may have believed she was moving to appellee's home. In fact, the record gives only the sketchiest picture of decedent's living arrangements.

is to have the Board correct their own failure to raise the confidential relationship issue at the hearing.

[9] Under duly promulgated Departmental regulations, "[a]n appeal shall be limited to those issues which were before the administrative law judge upon the petition for rehearing." 43 CFR 4.320. Although the Board also has authority in extraordinary cases to exercise the inherent authority of the Secretary to correct a manifest error or injustice, it has consistently declined to consider arguments and evidence raised for the first time on appeal. Kicking Woman, supra; Estate of Harold Humpy, 5 IBIA 132 (1976); Estate of Walking Woman, 3 IBIA 132 (1974); Estate of Pinnahge Pimme Pokibro, IA-861 (1958).

Even if the Board were disposed to consider this newly raised issue, appellants have not shown a manifest error has been committed. In raising their confidential relationship argument, they misstate the law. The tests enumerated in their reply brief at pages 14-15 are not the tests for whether a confidential relationship exists, but rather are the tests to determine whether, once such a relationship is shown, the principal beneficiary was so actively involved in the preparation of the will that a presumption of undue influence arises. Hills, supra. The Board has recognized that a confidential relationship exists in such circumstances as when an individual was the decedent's attorney, payee of BIA funds, or legal guardian, or when the individual had the decedent's power-of-attorney. Appellants have not shown or argued that such a relationship, or a comparable one, existed between decedent and appellee. 9/ The nebulous "insane delusion" and "misplaced trust" argued by appellants do not rise to the level of a confidential relationship.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Taylor's March 7, 1986, order denying rehearing is affirmed.

Kathryn A. Lynn
Acting Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge

9/ The testimony of one of appellants' witnesses at the 1984 hearing suggests that appellee may have had decedent's power-of-attorney at some time. Appellants failed to pursue this suggestion either at the hearing or in their reply brief, and the evidence falls far short of showing that appellee had decedent's power-of-attorney at any time, let alone at the time the will was drafted.